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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

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STEPHEN J. MCMAHON,
Of Counsel.

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To the Honorable, Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully petitions and prays this Court to reconsider its determination, or order, made on November 10, 1941, which denied his petition for a writ of

certiorari to the Supreme Court of the State of Wisconsin to review the judgment, decision, proceedings and determination of that Court in an action at law to which your petitioner and the above-named respondents are parties, and more particularly the judgment made and entered therein May 20, 1941, upon which a rehearing thereon was denied July 7, 1941.

Your petitioner respectfully shows:

I.

Respondents' brief opposing grant of writ was filed with this Court on or about October 23, 1941. Petitioner's reply brief was filed with this Court on November 7, 1941. Between those dates, petitioner was away from the City of Washington, D. C., and from his home at Milwaukee, Wisconsin, nearly all of the time on official duty for the United States Government, and more particularly for the Office of Civilian Defense, with which he has been officially connected for considerable time. Between those dates petitioner made several extensive trips to various parts of the United States on such official duty. Petitioner has been devoting himself almost exclusively to official duty for the United States Government in connection with the National Defense for approximately fifteen months past, continuously.

In that time petitioner has traveled nearly 90,000 miles, at least. Between October 23, 1941, and November 7, 1941, it was impossible, because of official duties, for petitioner to give proper attention to the preparation of Petitioner's Reply Brief, in conjunction with his Counsel, with whom he was unable to have sufficient contact and communication; and, because thereof, it was not decided until the evening of November 4, 1941, to authorize the filing of a reply brief. As a result of the enforced lateness of such authorization, only a little more than two days was allowed for the preparation of such reply brief; and less than one day was al-

lowed for the printing thereof, it being the desire of petitioner and his Counsel to file the same with this Court as timely as possible. Because of the foregoing, petitioner's reply brief did not fully or adequately present the facts and law or stress important phases thereof, and more particularly important phases of the law. Petitioner and his Counsel feel that in their reply brief which was filed their full duty to this Court has not been discharged.

Petitioner has been a member of the Bar of this Court since February 29, 1912 and has kept, and desires to keep, in close touch with the case at bar and with his Counsel in the case; he has advised and consulted with his counsel to the fullest extent practicable; and his Counsel has indicated a desire that he do so.

II.

The case at bar involves rights of *transcendant* importance, more particularly the rights of petitioner, and others similarly situated, pertaining to "trial by jury" in actions at law under the guarantee of "due process of law" under the provisions of Section 1, Article XIV, of the Amendments to the Federal Constitution. Petitioner's personal rights in this respect are involved in the case at bar. If this Court grants a petition for certiorari in the case at bar, any precedent established herein will, in petitioner's opinion, be of great value and importance.

III.

On or about October 27, 1937, petitioner commenced an action at law against the above-named respondents herein to recover damages for defamation by libel. Issue was joined and a jury was drawn to hear the evidence and render a verdict (R. 498-499). After hearing all of the evidence, the argument of Counsel, on both sides, and the instructions of the Judge of the Circuit Court of Milwaukee

County, Wisconsin, wherein the case was tried, the jury rendered a special verdict as follows:

"Question 1: Would a person of average intelligence and comprehension, upon reading the entire article in question printed in the Milwaukee Journals of November 3rd, and 4th, 1935, naturally have understood that it was thereby stated and charged that the plaintiff was guilty as a principal of the crime of malicious destruction of property? Answer: Yes.

"Question 2: If you answer Question 1 'no,' then answer this question: Would a person of average intelligence and comprehension, upon reading the entire article in question printed in the Milwaukee Journals of November 3rd and 4th, 1935, naturally have understood that it was thereby stated and charged that the plaintiff was guilty as accessory before the fact of the crime of malicious destruction of property? Answer: Yes.

"Question 3: If you answer Questions 1 and 2 'no,' then answer this question: Would a person of average intelligence and comprehension, upon reading the entire article in question published in the Milwaukee Journals of November 3rd and 4th, 1935, naturally have understood the statement concerning the plaintiff to charge him with neglect in the performance of his duty as mayor of the city to preserve the public peace and good order of the City, as to charge him with moral responsibility for the bombings? Answer: Yes.

"Question 4: If you answer Question 3 'yes,' then answer this question: Did such statement tend or calculate to bring the plaintiff into shame, humiliation or disgrace? Answer: Yes.

"Question 5: If you answer Question 3 'yes,' then answer this question: Was such statement in the light of the article as a whole a fair comment on the acts and conduct of the plaintiff in the performance of his duties as mayor of the city of Milwaukee? Answer: No.

"Question 6: In writing the article in question published in the Milwaukee Journals of November 3rd and

4th, 1935, was the defendant, Lawrence C. Eklund, actuated by malice? Answer: Yes.

"Question 7: In publishing the article in question on November 3, 1935, was the defendant, the Journal Company, actuated by malice? Answer: Yes.

"Question 8: In publishing the article in question on November 4, 1935, was the defendant, the Journal Company, actuated by malice? Answer: Yes.

"Question 9: In publishing the article in question on November 3, 1935, was the defendant, Harry J. Grant, actuated by malice? Answer: Yes.

"Question 10: In publishing the article in question on November 4, 1935, was the defendant, Harry J. Grant, actuated by malice? Answer: Yes.

"Question 11: If the Court should be of the opinion that plaintiff is entitled to recover, at what sum do you assess his compensatory damages? Answer: $10,000.00.

"Question 12: If you answer any of Questions 7, 8, 9, 10 and 11 'yes', and decide to assess punitory damages, then answer this question: What sum do you assess as and for punitory damages? Answer: $10,000.00.

Dated June 28, 1940" (R. 506-507).

The Wisconsin Courts changed the answers to Questions 1 and 2 from "yes" to "no" and held that the answers to questions 3-10 were insufficient to support a judgment for petitioner (R. 499, 509).

The defamatory words complained of were a very small portion of an article published by the Respondents' newspaper and are as follows:

> "The mayor of Sheboygan Falls has slight regard for his fellow mayor, Daniel Webster Hoan of Milwaukee, which was shunned by Kinite in its return to the state.
>
> "'Mayor Hoan travels around the country telling how well Milwaukee is governed,' said the mayor of Sheboygan Falls. 'Meanwhile terrorists bomb Milwaukee's police station and banks. Mayor Hoan himself is to blame for those bombings.'" (Transcript of Record 508.)

This is the only language to which the first two questions pertained, and these questions were peculiarly appropriate to be answered by a jury of laymen. They called for answers that could be best given by jurors composed of laymen.

We quote from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "The only reference to the plaintiff or his administration of his office was that contained in the quoted paragraph." (Transcript of Record 510.)

We quote further from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "To make its position as well as the position of this Court somewhat clearer some facts should be stated *in addition to those appearing in the pleadings.*" (Transcript of Record 509. Italics ours.)

It is not proper for a Court to base findings of fact upon pleadings. They must be derived from the evidence.

We quote further from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "The court determines whether a communication is capable of a defamatory meaning while it is the function of the jury to determine whether a communication capable of a defamatory meaning was so understood by its recipient. (Sec. 614, Restatement of Defamation.)" (Transcript of Record 514.)

We raise no question about the correctness of this statement of the law, but the Wisconsin courts invaded, erroneously, *"the function of the jury"* as stated above when they changed the answers of the jury to the first two questions of the special verdict.

We raise no question about the correctness of the Restatement of the Law of Torts at page 513 of the Transcript of the Record as set forth by the Wisconsin Supreme

Court, which deals with the subject of "Criticism"; but the above quoted defamatory language is not "Criticism", privileged or otherwise. It is an untrue defamatory statement, which is not in the form of "Criticism". It is an untrue statement, defamatory, ascribed to another in narrative form.

We quote further from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "The plaintiff also contends that he has been deprived of the right of jury trial by the determination of the trial court. It is considered that this contention is without merit." (Transcript of Record 514.)

We quote finally from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "On Motion for Rehearing
>
> Per Curiam:
>
> On motion for rehearing. In support of his motion for rehearing, plaintiff contends that in the trial of the action he was denied due process of law and the equal protection of law under the Fourteenth amendment to the Constitution of the United States. We have carefully examined this contention and find no basis for its support in the record." (Transcript of Record 517-518.)

We believe that Petitioner will suffer a denial of due process of law, as guaranteed by Section 1, Article XIV, of the Amendments to the Federal Constitution, by a denial to him of "trial by jury" in the case at bar, in the event that this Court does not grant to him a writ of certiorari as prayed for in his original Petition therefor, and the other relief therein prayed for.

We respectfully submit a brief with this petition in support hereof, wherein further grounds therefor are more fully set forth.

Wherefore, we pray that this Petition for a Rehearing be granted, and for the relief sought in the prayer of such original Petition of this Petitioner, filed and docketed in this Court on October 4, 1941.

Respectfully submitted,

DANIEL W. HOAN,
Petitioner,

STEPHEN J. McMAHON,
Of Counsel.

FRANCIS E. McGOVERN,
Counsel for Petitioner.

CITY OF WASHINGTON,
District of Columbia, ss:

Daniel W. Hoan, being first duly sworn, on oath says that he is the petitioner named in and who signed the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein obviously alleged on information and belief, and as to those matters he believes it to be true.

DANIEL W. HOAN,
Petitioner.

Subscribed and sworn to before me this 5th day of December, 1941.

VERNON B. STICKLEY,
Notary Public.

(Notorial Seal)

My commission expires August 15, 1946.